No. 10580

In the United States Circuit Court of Appeals

For the Ninth Circuit

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,
Appellant,

vs.

EDWARD J. JASPER, Administrator of the Estate of Emmett C. Jasper, deceased; and ALBERT BROWN,
Appellees.

CHARLES M. DAKE, *Defendant.*

Appellant's Reply Brief

Appeal from the District Court of the United States for the District of Oregon

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Respecting specifications of errors I and III appellees makes several contentions which herein have been separated and are discussed under point headings.

POINT A.

That Dake had express permission originally to take the truck citing a line of authorities which

express the view of a small minority that where the original taking is with express permission of the owner, the driver is considered an additional insured under an automobile public liability policy even though he be involved in an accident while using the car for some other purpose than the original purpose for which permission was given. These authorities appear on p. 14 of Appellees' brief. Generally, they applied the rule announced in the comparatively early Tennessee case of Stovall v. New York Indemnity Company, 8 S. W. (2d) 473. Originally it was thought by some that no matter how great the departure was from the original permission granted, that nevertheless the driver should be considered an additional assured under the policy. The most that this minority line of authorities stand for now is that when there is a "slight deviation" from the use for which permission was originally granted, then the permitee is entitled to be considered an additional insured under such a policy of insurance. This small minority line of authorities is gradually disintegrating. In the first place it is to be observed that the facts in each of the so-called minority decisions concerned an employee whose employment required the regular use of a car, such as salesmen and chauffeurs and who drove the particular car in

question beyond the limits of the sales territory, or, in the case of a chauffeur, beyond the place for which the express permission was given. The courts now applying the minority rule refer to it as the "slight deviation" rule. The minority rule thus has gradually switched to the view of the great weight of authorities which follow the decision of this court in Frederikson v. Employers Liability Assur. Corp. (C.C.A. 9, 26 Fed. (2d) 76). The states of Tennessee, Minnesota, Illinois, Louisiana and possibly Connecticut, originally made up the minority view. The modification of the original rule can be observed in later decisions from the respective jurisdictions. For the trend in Tennessee, see American Auto. Insurance Co. v. Jones, 45 S. W. (2d) 52; and Preferred Accident Insurance Co. v. Barker, 104 Fed. (2d) 424, 426 wherein the Federal Court, in reviewing the Tennessee law, states:

> "In the case of Romines v. Preferred Accident Insurance Company, unreported, decided by the Supreme Court of Tennessee on November 26, 1932, the assured directed the employee to take his car two blocks and put it in a garage. Instead of carrying out instructions, he drove some distance out on a highway, had a collision and injured the plaintiff, occupant of the other car. The employee was sued, judgment obtained and insolvency appearing, the plaintiff sued under the 'omnibus' clause of the policy. The court, in referring to the Stovall case, said 'that a distinction

should be taken between the scope and legal implications of a permission like that given to a salesman intrusted with a car and a permission to use a car for a specified purpose for a limited time. Here the owner of this car was in legal possession thereof at a point within two blocks of a garage to which he directed the driver of the car to proceed. This driver had been employed for a particular purpose. That purpose had been nearly accomplished. The owner of the car intended that the driver should relinquish possession at the garage within five or ten minutes. The accident occurred at a point far distant from the garage to which the car was destined by its owner and at a time several hours later. To say that such deviation from the orders given by the owner with respect to his car could be construed as a use of the automobile with the permission of the owner is too strong a statement."

The same trend is noted in Minnesota: Liberty Insurance Co. v. Stilson, 34 Fed. Sup. 887; and in Louisiana, Farnet v. DeCuers, decided 1940, 195 So. 797. And in Connecticut, Mycek v. Hartford Accident and Indemnity Company (d. 1941), 128 Conn. 140, 20 A (2d) 735.

There is another reason why the early minority decisions are disintegrating and that is a change which had been made in the policy provision since those cases were decided. The language of the policy has been changed to read, provided "actual use" is

with permission of the named insured. Formerly, the word "actual" was not in the provision. Generally the courts are construing these words to mean just what they say: that the ACTUAL USE at the time of the accident was with permission of the named insured.

The reframing of the omnibus provision by inserting the words "actual use" is commented upon by the Supreme Court of Pennsylvania (1939) in Laroche v. Farm Bureau Mut. Automobile Ins. Co., 7 Atl. (2d) 361, 363:

> "It is to be noted that in the present policy the phraseology employed is 'provided * * * the actual use is with the permission of the Named Insured.' Perhaps a better term for what evidently was intended by the use of this adjective would have been 'the particular use.' In Appleman on Automobile Liability Insurance, p. 110, the term 'actual use' is said to be designed to defeat the minority view that, if permission to use the car is given by the insured, the permission need not cover the specific purpose for which the car is being driven at the time of the accident."

The Federal District Court, W. D. Wisconsin (1940) in Johnson v. Maryland Casualty Co., 34 Fed. Sup. 870, considers these new words "actual use" in an omnibus provision of an insurance policy, page 871:

"There being no permission for the actual use, there was no coverage extended by the terms of the terms of the policy to Wirth. The deviated use in this instance cannot be said to be with the permission of the named assured, and no liability exists on the part of the defendant to the plaintiff under the terms of the policy defendant issued to Swift & Company. Actual use means the use to which the automobile is being put at the time of the collision with the permission of the named insured. It can mean nothing else. Caldwell v. Standard Accident Insurance Co., 6 Cir., 98 F. 2d 364; American Casualty Co. v. Windham, D. C., 26 F. Supp. 261; Columbia Casualty Co. v. Lyle, 5 Cir., 81 F. 2d 281; Laroche v. Farm Bureau Mutual Automobile Insurance Co., 335 Pa. 478, 7 A. 2d 361."

Liberty Mut. Ins. Co. v. Stilson, 34 Fed. Sup. 885, 887 (Minn.):

"Nor do the facts here permit of a consideration of the so-called "slight deviation" doctrine. As stated, Homer Stilson testified that he knew that his father would never let him take the car to Chicago. C. W. Stilson testified that had he known what the son contemplated he would never have permitted the automobile's use for the trip. Therefore, Homer Stilson possessed no authority from his father for the **"actual use"** to which he put the car. Express permission for a given purpose does not imply permission for all purposes. See Trotter v. Union Indemnity Co., 9 Cir. 35 F. 2d 104; Frederiksen v. Employers' Liability Corp., 9 Cir. 26 F 2d 76. For a discussion of "actual use" see recent text-book Appleman on Automobile Liability Insurance, pages 110-116.

The defendants rely on Peterson v. Maloney, 181 Minn., 437, 232 N. W. 790; Stovall v. New York Indemnity Co., 157 Tenn. 301, 8 S. W. 2d 473, 72 A.L.R. 1368; and Dickinson v. Maryland Casualty Co., 101 Conn. 369, 125 A. 866, 41 A.L.R. 500. These cases did not contain the same language in their respective policies as that here involved and it might be inferred that the language of the insurance policy now before the court was adopted to avoid the claimed ambiguity in these cases. I do not understand that the Minnesota court has ruled that in any case once permission is given for the use of the car, liability follows under the omnibus clause of the policy. Certainly no similarity in factual situation exists between this case and those relied upon by the defendants. The Maloney case possessed no element of fraud or deceit and obviously implied authority to use the car existed when and for the purpose it was used. The Dickinson case involved a slight deviation only. Here a lie bottomed Homer Stilson's permission to use the car. Consent to use being obtained by deceit, how with minds thus apart can consent be implied for permission to use the car?"

The foregoing decisions are in harmony with the majority view. The Frederickson decision by this court is repeatedly cited for the majority view which requires that the use being made of a car at the time of the accident be with the permission of the named insured and that it is insufficient that the person driving the car had permission to use it for some other purpose or to make some other use of it. A

recent case citing the Frederickson decision with approval is Hodge v. Ocean Accident & Guarantee Corp., (Ga. 1941), 18 S. E. (2d) 28, which case cites the following Authorities for the same view:

Denny v. Royal Indemnity Co. (Ohio) 159 N. E. 107;

Johnson v. American Auto Ins. Co. (Me.) 161 A. 496;

Columbia Cas. Co. v. Lyle (5 C.C.A.) 81 F. 2d 281;

Byrne v. Continental Cas. Co., (Ill.) 23 N. E. (2d) 175.

The Pennsylvania Supreme Court in Laroche v. Farm Bureau Mut. Automobile Ins. Co., supra, in analyzing the two lines of decisions, states, p. 362:

> "Their study reveals that it is the rule in some states that if the original bailment was made with the consent of the insured it is immaterial that subsequently the automobile is driven to a place or for a purpose not within the contemplation of the insured when he parted with possession; accordingly the insurance company is held liable even though the accident happens while the car is being used on an errand not embraced within the limits of the permission given. But in the majority of jurisdictions it is held that, while slight and inconsequential deviations will not annul the coverage of the omnibus clause, there is an absence of 'permission,' within the meaning of the policy, if the car is being driven at a time or place or for a purpose not authorized by the insured. The differ-

ence between these two views resolves itself largely into whether, as pointed out in Dickinson v. Maryland Casualty Co., 101 Conn., 369, 125 A. 866, 41 A.L.R. 500, the word 'permission' is to be construed as meaning permission to use the car, or permission to use the car in a specified manner and for a specified purpose.

"In our own state the trend is markedly in the direction of the majority view. In Powers v. Wells, (115 Pa.) Super, 549, 176 A. 62 and in Truex v. Pennsylvania Manufacturers' Association Casualty Insurance Co., 116 Pa. Super. 551, 176 A. 756, in each of which there were substantial deviations from the purpose for which permission to use the car was given, it was held that there could be no recovery on the policies. In Brower v. Employers' Liability Assurance Co., Ltd., supra, and in Ferguson v. Manufacturers' Casualty Insurance Company of Philadelphia, 129 Pa. Super. 276, 282, 195 A. 661, the question was discussed but the decisions were placed upon other grounds. In Randig v. O'Hara, 123 Pa. Super. 251, 187 A. 83, a general authority to operate the automobile had been given by the insured, and it was held that this was not abrogated or suspended by language which, in the opinion of the court, amounted to an expression of wishes rather than a revocation of the authority."

The Court then discusses the new phraseology contained in the omnibus provision "actual use" and the reason therefore namely, to overcome the original minority view.

Appellees' brief makes the blunt statement that

Dake had express permission to take the truck but makes no reference to the record to bear this statement out. There is no evidence in the record of any express permission. The only two persons who testified concerning it were Wells and Dake. Wells testified that he had given no permission to Dake to use the truck. Dake called as a witness on behalf of appellees admitted he had no permission from Wells to take the truck on the joy ride. The most Dake would say was that he had an understanding with Sheldon (not Wells) that if Sheldon did not show up Sunday morning that he, Dake, could take the truck and go hunting up near the logging operations. There are no authorities which spell out an express permission from the owner through a situation of this sort. One having permission to use another's car cannot extend that permission to a third person so as to bring the third person within the omnibus provision of this type of Insurance policy. This matter is briefed under Specification of Error No. 2 in Appellant's original brief. Appellee's brief does not controvert it.

And finally we have the decision of the Supreme Court of Oregon in the state court action which arose out of the same accident and involved the identical facts, holding outright that Dake had no per-

mission to use the truck. Jasper, Adm. v. Wells, Dec. 30th, 1943, Oregon Advance Sheets Vol. 37, p. 585. At p. 588 the court states:

> "The evidence given by the defendant Wells was direct, repeated, positive, without contradiction or impeachment and may be summarized as follows: Dake was in the general employ of Wells as a top loader in the camp. He was not in the employ of Wells on Sunday, the 28th of June, **nor was he authorized, directly or indirectly, to take the truck on that day for any purpose.**" (Emphasis ours.)
>
> P. 588-589: "Wells never allowed the men to use the truck without special permission, of which fact Dake was aware. Dake had never, to Wells' knowledge, used the truck unless Wells told him to do so as a part of his work, in and near the camp. Wells had given Dake special permission the previous summer to use the truck for a hunting trip over private roads only. Dake had not, to his knowledge, used the truck for any such purpose since that time. **Wells had no knowledge that Dake was going to take the truck on Sunday, the 28th, or that Dake was going to Tillamook on that date.** Dake's testimony was to the same effect; namely: that he drove the truck **without Wells' permission** or knowledge. The trip to Tillamook was for his own pleasure. He had no purpose relating to Wells or to Wells' business in going on the trip. There is not a hint of conflicting testimony as to what Dake actually did or where or with whom he went." (Emphasis ours.)

Under the new words "actual use" now contained in the policy, it would seem clear under the uncon-

tradicted evidence in this case that the plaintiff is entitled to declaratory judgment of non-liability under its policy. The uncontradicted evidence is that Dake had no permission, express or implied, to take the car to go on a drinking carousal. Even under the doctrine of the early minority, Dake would not be considered an additional insured. No case has been found in which the driver was considered an additional insured under such a policy, under facts such as we have here. Dake's drinking trip covered a distance of some 135 miles, the trip began before noon and came to a halt shortly before midnight when he met with the accident referred to. There is not the slightest suggestion that Wells ever heard that Dake contemplated going on this joy ride. The uncontradicted testimony is that Wells learned for the first time the following morning that Dake had taken the truck. Knowing nothing about the joy ride until the day after it occurred, how can it reasonably be contended that permission can be spelled out under this policy provision which requires "actual use," be with permission before the driver is entitled to be considered an additional insured.

There being no express permission for Dake to take the truck the authorities cited by appellees have no relevancy.

POINT B.

Appellees next argue, that there was an implied permission for Dake to use the truck. Although the authorities they cite, as pointed out above, all deal with the point of deviation after an express permission has been given. It would seem to be reasonable that implied permission might be shown in instances where the facts reveal a custom and practice existing over a period of time where the owner of a car with knowledge and without protest permitted another to make use of his car, if that use was the same as it was being used for at the time of the accident. Custom and practice would have to be for a use contemplated by the parties. There are no facts here to show any prior use of the truck by Dake out on a highway on a personal pleasure trip, much less on a drinking joy ride. Appellees on pages 2 and 3 of their brief refer to other occasions on which Dake used the truck, however these statements need some clarification. For instance, it is stated that Dake used the pick up truck to go fishing. It is to be noted, however, that Wells knew nothing about this. Dake apparently took the truck one evening and drove it a short distance up the highway to go fishing; Dake frankly stated that he took it without saying anything to Wells, T. 112, 113. Wells learned nothing

about this until the time of the trial. T. 164. The same thing is true respecting the use of the truck to drive to Timber for half a case of beer. In the first place, it should be pointed out this occurred during the prior year; Dake did this without any knowledge on the part of Wells and the evidence comes from Dake and is uncontradicted. T. 110, 111. And again, respecting the gasoline which Dake used in filling the tank of the pick up truck at the scene of the logging operations. This was done entirely without any knowledge of or consent from Wells. The only time that Dake used the truck with Wells' knowledge was a year earlier, at the time the crew were living and working on the other side of Round Top Mountain. At that time, Wells did let Dake use the truck on a few occasions to hunt in and around the logging operations but never to take it out on the highway and in so using the truck Dake may have purchased the gasoline. In addition to this, Dake testified that Wells, a year before this accident occurred, permitted him to take the truck in to Portland and bring back his wife and household furniture. Appellees state that Dake had driven the truck to Tillamook, however, the evidence shows that, if he did, Wells had no knowledge of it. T. 149, 164. Certainly there is nothing here that would make out a case of

implied permission. It was well known around the camp that Wells would not let anyone use this truck without his express permission. T. 181. The Supreme Court in the state court case, respecting this, states:

P. 588:

> "Wells never allowed the men to use the truck without special permission, of which fact Dake was aware. Dake had never, to Wells' knowledge, used the truck unless Wells told him to do so as a part of his work in and near the camp. Wells had given Dake special permission the previous summer to use the truck for a hunting trip over private roads only. Dake had not, to his knowledge used the truck for any such purpose since that time. Wells had no knowledge that Dake was going to take the truck on Sunday, the 28th, or that Dake was going to Tillamook on that date."

POINT C.

Appellees make the point that the ruling of the trial court should be upheld on the theory that the trial court is entitled to draw different inferences from the evidence. The trouble with that contention is that there is no conflicting evidence. A court can not draw an arbitrary inference where there is no evidence to support it. In presenting the evidence, appellant has presented it in the most favorable light to the appellees. Dake was the only one who testified as to the use of the truck for the appellees and it is

Dake's testimony appellant relies upon for the proposition that there is no substantial evidence in the record to uphold the judgment of the lower court. This very same issue of whether Dake had any permission to take the truck and just what Dake was doing with the truck at the time of the accident, is set forth by the Oregon Supreme Court in its decision involving the same accident we are concerned with here, Jasper v. Wells, supra, p. 586,

> "The admission that the car was owned by Wells established a prima facie case of agency under the decisions of this court, to which reference will later be made. Accordingly, the defendant went forward with the evidence and expressly denied that Dake was acting as his agent **or was authorized to take the car for any purpose.**" (Emphasis ours.)

And the court then points out that the evidence of both Wells and Dake stands without contradiction to the effect that Dake was not authorized directly or indirectly to take the truck on the day of the accident for any purpose. The court said, p. 588:

> "The evidence given by the defendant Wells was direct, repeated, positive, without contradiction or impeachment and may be summarized as follows: Dake was in the general employ of Wells as a top loader in the camp. He was not in the employ of Wells on Sunday, the 28th day of June,

NOR WAS HE AUTHORIZED, DIRECTLY OR INDIRECTLY, TO TAKE THE TRUCK ON THAT DAY FOR ANY PURPOSE. Dake had no business of Wells to perform on that day. Wells never allowed the men to use the truck without special permission, of which fact Dake was aware. Dake had never, to Wells' knowledge, used the truck unless Wells told him to do so as a part of his work, in and near the camp. Wells had given Dake special permission the previous summer to use the truck for a hunting trip over private roads only. Dake had not, to his knowledge, used the truck for any such purpose since that time. Wells had no knowledge that Dake was going to take the truck on Sunday, the 28th, or that Dake was going to Tillamook on that date. Dake's testimony was to the same effect, namely, that he drove the truck without Wells' permission or knowledge. The trip to Tillamook was for his own pleasure. He had no purpose relating to Wells or to Wells' business in going on the trip. There is not a hint of conflicting testimony as to what Dake actually did or where or with whom he went." (Emphasis ours.)

In short, there is no conflicting evidence in this case from which an unfavorable inference could be drawn by the lower court. On the uncontradicted testimony of appellees' witness Dake, plaintiff here is entitled to a declaratory judgment in its favor.

There is an entire lack of any evidence of any custom or practice which would spell out any implied permission to use the truck to go out on a joy ride.

The New Jersey court, in considering the type of evidence required to show such an implied permission in Penza v. Century Indemnity Company, 197 A. 29, 30 states:

> "There is no evidence of any such usage or practice here. It is all to the contrary. Hubert had never taken the car out without his employer's specific permission, nor had he ever before used the car for his own purposes. The implied permission from Edwards, Sr., to Hubert, in view of the common practice that had theretofore existed between them, was that Hubert should return the automobile to the place provided for it by his employer, and that is what he did. As stated before, he parked the car in the rear of the boarding house and after about an hour, feeling better, instead of going to bed as he stated, he took the car from the place where it was parked for the night, and went out on a joy ride of his own, during which he ran into and injured the plaintiff. The hiatus or break which intervened between the parking of the car for the night and the subsequent unauthorized taking thereof by Hubert for his own purposes distinguishes, in our opinion this case from Rikowski v. Fidelity & Casualty Co., 117 N.J.L. 407, 189 A. 102, 103, relied upon by the plaintiff."

Also see Denny v. Royal Indemnity Co., 159 N. E. 107, 20 Ohio App., 566, to the effect that if the master had no knowledge of deviation or wrongful use, he could not be held impliedly to have consented to such use. To the same effect is Laroche v. Farm Bureau

Mutual A. Ins. Co., (1939) 7 A. (2d) 361, 335 Pa. 478.

Appellees here seem to take the position that the fact Dake had permission from Sheldon to use the truck in the morning to go hunting (if Sheldon did not show up), would carry over and permit Dake after the hunting trip was completed, to start out again and use the truck on a joy ride. This is contrary to the authorities which stand unanimously for the proposition that where a person is given permission to use a car for a certain purpose and the car, after such use, is returned and such person thereafter re-takes the car to use it for another purpose then such person is excluded from coverage under the owners insurance policy. Nicholas v. Independent Indemnity Co., N.J., 165 A. 868, 11 N.J. Misc., 344 stands for the proposition that the mere fact the driver of an automobile had rightful custody of the automobile for the purpose of storage would not give him the right to use the car for purposes not contemplated by the owner. In Penza v. Century Indemnity, (N.J.) 197 A. 29 it was held where chauffeur, who was permitted by borrower of automobile to take the automobile to chauffeur's boarding house, informed borrower he was going directly to boarding house and retire because he had a cold, automobile accident which occurred when chauffeur who had

not previously used automobile for his own pleasure, later in evening without borrower's knowledge took the automobile on a sight-seeing tour, was not covered by omnibus covering provision of automobile liability policy, since chauffeur did not have permission to use automobile at the time of the accident.

And in Farnet v. DeCuers, La. (1940) 195 So. 797, it was held that where a person given custody of an automobile to accomplish a certain purpose, and he puts the car away after completing such purpose, a subsequent retaking of the automobile by such bailee is deemed a new use for which a new consent must be given and in the absence of a new permission the bailee is not covered as an additional insured.

The Supreme Court of Oregon, in Jasper v. Wells, supra, points out that Dake's hunting trip had terminated and that there was a re-taking of the truck when he went joy riding: p. 589

> "The hunting trip was ended and the car had been returned to the place from whence it had been taken before the fatal journey was begun. The trip to Tillamook in the afternoon was an entirely independent transaction having nothing to do with the hunting trip in the morning."

The so-called minority view which appellees cite in support of their argument that there was implied

permission for Dake to take the truck on the joy ride are of no help to him what ever as they deal only with situations where there was an original **express permission** not implied permission. Counsel for appellant has been unable to find a single authority which has held the driver to be covered under the additional insured clause under facts similar to those here. Moreover the re-taking of the truck by Dake distinguishes this case from every authority cited by appellees.

POINT D.

Appellees' brief, p. 15, contends that

> "The law in Oregon is in harmony with the Dickinson, Ronan and Stovall cases." The so-called "minority rule."

These cases have already been discussed above and the later cases from those jurisdictions have been cited, which modify or over-rule the earlier decisions. In any event, those decisions relate solely to situations where there was an **original express permission** to use the car. Appellees cite for their statement that the Oregon law is in harmony with the small early minority authorities, the Oregon case of

Denny v. Oregon Automobile Ins. Co., 151 Ore. 42, 47 P. (2d) 245; 47 P. (2d) 946.

Putting aside for the moment that there is no evidence of any express permission here for Dake to use the truck, it will be observed from a reading of the Denny case that there was no question of permission involved. There was no question in that case of either express or implied permission under the additional insureds clause. The car was owned by the county and was being operated by a county official on county welfare work at the time of the accident. No one suggested that Judge Kennedy, the county official involved, was operating the car without permission of the county. It is a recognized fact in that case that he was operating the car with permission of the county and it was the express finding of fact by the jury that he was on county business at the time of the accident. He was on a mission concerning a woman and her children who were receiving aid from the county. In that case it was contended by the insurance company that by a warranty in the policy the automobile was to be used only by the health nurse. The actual warranty appears in the court's decision, p. 47: "The automobile described will be used by health nurse of Yamhill County." It appears from the decision that the work which Judge

Kennedy was doing at the time of the accident was of the nature generally looked after by the health nurse of Yamhill County. The court placed no construction on any question of permission or for that matter on the additional insureds clause at all, as will be seen from the court's language:

> P. 53 "In the case at bar it is necessary to construe the entire policy of insurance to determine whether or not the insurance on the car was limited to the period of its use by the health nurse exclusively. The policy does not state that the car shall be used only by the health nurse."
>
> P. 54 "It is contended by the appellant that if any effect whatever be given the 'additional assured' clause, it would render meaningless the clause in the policy relating to the health nurse, and that full effect can not be given to both of these provisions. It is true that the construction of the policy urged by appellant, to-wit: that the use of the car is limited solely to the health nurse, can not be given effect unless the 'additional assured' clause be entirely ignored."

And the Court did just that; it did not place any construction on the additional assured clause but simply ignored the additional assured's clause and constructed the warranty referred to above respecting the use of the car "by health nurse of Yamhill County," stating:

> P. 54 "When the entire policy of insurance is construed, as indeed it must be, it is obvious that the interpretation contended for by the appellant is too narrow, and that the policy does cover use of the insured car by the legal representatives of Yamhill County, of whom Judge Kennedy was one."

On the other hand there is law in the State of Oregon which stands for the proposition that permission to use a car on former occasions does not carry with it any implication that it can be used at subsequent times. And also for the proposition that when permission has been given to use a certain car for a given purpose and an employee takes a different car for the same purpose but without permission, and becomes involved in an accident, that no permissive use can be spelled out against the employer.

The Court in Jasper v. Wells, supra, cites Lehl v. Hull, 152 Ore. 470, 53 P. (2d) 48, 54 P. (2d) 290, for the proposition that Dake had no permission to use the truck. In that case the adult son who had used his father's car on prior occasions, attempted to get permission by telephone, but could not reach his father, and took the car anyway; it holds the son was using the car without permission. The Court states in the Jasper case, p. 594, on this same subject:

"In the case of Allum v. Ball, supra, the owner of a truck directed one Clement to take a Chevrolet coupe and go for a chauffeur's license. Finding the coupe locked, Clement disengaged the trailer from a log truck and with another man drove off in the cab of the truck. This court said: 'We cannot agree with plaintiffs that Clement acted reasonably in taking the truck when the only **express permission** granted him referred to the coupe.' Allum v. Ball is in some respects a stronger case for the plantiff than is the one at bar. In that case permission was given to use a car but not the car which was taken. In the case at bar there was no permission to use any car. Yet, in Allum v. Ball judgment for the plaintiff against the owner of the truck was reversed by this court." (Emphasis ours.)

Thus it will be seen that the applicable Oregon law relating to permission is exactly contrary to appellees contention. On the other hand it entirely supports appellants' position.

POINT E.

Specification IV.

Appellees claim the factual situation passed on by the Supreme Court is not res adjudicata, citing generally federal authorities from other jurisdictions. However, it is believed that we are controlled here by the Oregon Law. The Oregon law stands for the

proposition as shown in appellant's original brief, that every fact that was in issue or every fact that could have been put in issue is res adjudicata as to such facts, whether in the same action or a different action. And under what appellee refers to as the "familiar Erie decision" the Oregon law would apply.

In the trial of the state court action plaintiff, (appellee Jasper here) contended that Dake, in driving the truck to Tillamook, had implied permission from Wells to use it to go and see whether his "cousin Mike" might want a job working in the woods and of course if the evidence had sustained any implied authority for Dake to go to Tillamook in Wells' truck there would have been some inference that Dake was on Wells' business at the time and it would have been a question of fact possibly for the jury whether Dake was acting within the scope of his employment and with authority from Wells. If there had been any facts from which an inference of employment could be made out, such inference of employment would necessarily carry with it permission to take the truck. The Court in Jasper v. Wells, discusses this proposition at p. 590 and at p. 591 pointing out what burden plaintiff (appellee Jasper here) had in order to make out his case in the state court action: (p. 591)

> "**The plaintiff had a double burden, first, to show a permission to take the car,** and, second, to show that it was being used in the business of the defendant Wells. If, as we think, the undisputed evidence discloses that Dake had no duties to perform at Tillamook, then it is doubly clear that he had no duty to perform for Wells on the trip north on the Coast Highway, on the beach at Twin Rocks, nor on the circuit over the Wolf Creek Highway at the scene of the accident." (Emphasis ours.)

A reading of the Oregon Supreme Court decision will show that the court repeatedly states that Dake was not authorized to take the truck for any purpose and that he had no permission to use the truck; that he was performing no business for Wells; that he was not "authorized directly or indirectly to take the truck on that day for any purpose" and the court referring to what was in issue in that case states: p. 586

> "Accordingly, the defendant went forward with the evidence and expressly denied that Dake was acting as his agent **or was authorized to take the car for any purpose.**"

P. 588:

> "He was not in the employ of Wells on Sunday, the 28th of June, **nor was he authorized, directly or indirectly, to take the truck on that day for any purpose.**"

These facts having been passed on once they are conclusive against appellee Jasper. Appellant should not be required to relitigate them.

It is respectfully submitted that there is no evidence to support the judgment entered by the lower court and the same should be reversed with declaratory judgment entered in favor of appellant.

Respectfully submitted,

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Attorney for Appellant.